

ESTATE OF LUCY BUFFALO LITTLE COYOTE
A.K.A. THYRA REDBIRD

IBIA 88-24

Decided January 10, 1989

Appeal from an order denying petition for rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 73 P 86-1.

Vacated and remanded.

1. Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

2. Administrative Procedure: Administrative Procedure Act--Indian Probate: Hearing: Full and Complete--Indian Probate: Witnesses: Cross-examination

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

3. Indian Probate: Bureau of Indians Affairs: Generally--Indian Probate: Wills: Disapproval of Will

Failure of the Bureau of Indian Affairs to commence probate within 90 days of notice of an Indian's death, as required by 43 CFR 4.210(b), is not grounds to revoke approval of an Indian will.

4. Indian Probate: Wills: Generally

Bureau of Indian Affairs instructions on the printed Indian will form and the form "Affidavit to Accompany Indian Will" are not Departmental regulations and are advisory only.

5. Indian Probate: Wills: Witnesses, Attesting

The fact that an attesting witness is related to the testator does not invalidate the will.

APPEARANCES: H. Gene Seigel, Esq., Tulsa, Oklahoma, for appellants; Joe Arvizu Rodriguez, Esq., Lame Deer, Montana, for appellees.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Bruce Whiteman, Sr., and Michael Joe Rice, a.k.a. Wesley Hawk, seek review of a February 12, 1988, order denying rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Lucy Buffalo Little Coyote, a.k.a. Thyra Redbird (decedent). For the reasons discussed below, the Board vacates that order and remands this case for further proceedings.

Background

Decedent, an unallotted Cheyenne Indian of Oklahoma, was born on July 9, 1909, and died testate on May 2, 1985, at Billings, Montana. A hearing to probate her trust estate was held on July 30, 1986, at Concho, Oklahoma, by Administrative Law Judge Sam E. Taylor. The will scrivener was not present at the hearing. Because of a conflict in the testimony of the two attesting witnesses concerning the execution of decedent's will, Judge Taylor requested Administrative Law Judge Keith L. Burrowes to take the testimony of the will scrivener, who was an employee of the Northern Cheyenne Agency, Lame Deer, Montana. Judge Burrowes took the scrivener's testimony by deposition on December 22, 1986, at Billings, Montana.

On February 25, 1987, Judge Taylor issued an order approving decedent's will. Acknowledging the conflicting testimony of the witnesses, he found that the preponderance of the evidence showed that the will was properly executed, that decedent had the requisite testamentary capacity, and that no undue influence was imposed upon her. He therefore ordered that decedent's estate be distributed in accordance with her will. He also approved five creditors' claims filed against the estate.

Appellant Whiteman, a son of decedent, filed a petition for rehearing on April 20, 1987. He alleged that, because decedent was blind and hard of hearing, she could not have provided the legal descriptions of her property which appeared in the will. He also argued that decedent's mother, Black Woman, through whom decedent had inherited some of her trust property, did not want her property to pass by will. Further, he sought investigation of one of the claims approved by Judge Taylor, a claim filed by the Big Horn County Memorial Hospital and Nursing Home (hospital).

Appellant Rice, a son of decedent's predeceased daughter, Nellie Whiteman Hawk, filed a separate petition for rehearing on April 23, 1987. He sought rehearing on the grounds that inadequate notice of the probate hearing had been provided. He also alleged that no reason for his omission from decedent's will was given in the will, contrary to the instructions printed on the will form; that one of the attesting witnesses had not seen decedent place her thumb print on the will; that one of the attesting witnesses was related by marriage to some of the beneficiaries under the will; and that there were irregularities in the affidavit accompanying the will.

A third petition for rehearing was filed on April 27, 1987, by Steven R. Hawk, another son of Nellie Whiteman Hawk. Hawk's petition sought distribution of decedent's estate to her heirs per stirpes rather than in accordance with the scheme set out in her will.

Judge Taylor considered the three petitions together and issued an order denying rehearing on February 12, 1988. He denied Hawk's petition on the grounds that the petition did not allege any error in the order approving decedent's will but simply sought a distribution of the estate different from that provided for in the will.

With respect to Whiteman's petition, Judge Taylor found that the scrivener had prepared decedent's will with the aid of an earlier will containing the legal descriptions of decedent's property. He noted that the scrivener had testified decedent was very familiar with her property and was able to identify the several tracts of land by the names of the original allottees. The Judge further found that decedent was under no obligation not to make a will disposing of the property she had inherited from Black Woman. Concerning the claim of the hospital, Judge Taylor noted that Whiteman had testified at the probate hearing that he had no objection to it. He found that Whiteman alleged no new facts or evidence concerning the claim.

With respect to Rice's petition, Judge Taylor found that Rice had been mailed timely notice of the July 30, 1986, probate hearing, that the notice had not been returned by the post office, and that Rice was therefore presumed to have received it. The Judge also found that decedent's failure to give reasons for omitting Rice from her will did not invalidate the will. Concerning the discrepancies in the attesting witnesses' testimony, Judge Taylor stated:

Petitioner Michael Joe Rice further alleges that the decedent's will was not executed in the presence of and by the witness, Evelyn White Crane, and that Evelyn White Crane testified that a man, not a woman was the scrivener of said will. According to the record, Evelyn White Crane testified that she was told it was the decedent's will which she and her daughter, Mary Ann White Buffalo Gray were signing as witnesses (Transcript at 17). She also testified that she saw her daughter sign the will (Transcript at 16) but she does not recall seeing the decedent place her thumbprint on the document (Transcript at 16). Her daughter and the scrivener of the will did testify that the decedent placed her thumbprint on the document in the presence of both witnesses and scrivener. This discrepancy and Mrs. White Crane's testimony that a man was present who directed the execution of the said will rather than a woman was noted in the order [approving will] of February 25, 1987. As stated therein, Mrs. White Crane was very hesitant in giving her testimony and obviously did not appreciate being a party to the disagreement between decedent's sons. Her testimony and that of her daughter and the scrivener were duly

weighed and in the opinion of the trier of the facts, the preponderance of the evidence was that the decedent duly executed her will and did so voluntarily, without any undue influence, and was fully competent to do so at the time.

(Order Denying Petition for Rehearing at 2-3). Judge Taylor further found that the fact that one of the witnesses was related by marriage to decedent and the beneficiaries did not invalidate the will. Finally, he found that the irregularities in the affidavit accompanying the will were immaterial because testimony of the witnesses and the scrivener was taken to prove the will.

Appellants' notice of appeal was received by the Board on April 11, 1988. Briefs were filed by appellants and by appellees James Little Coyote, Dewanda (Dawana) Little Coyote, Reva Red Fox, Karen Red Fox, and Robert Red Fox, who are beneficiaries under decedent's will.

Discussion and Conclusions

On appeal to the Board, appellants seek reversal of Judge Taylor's order on the grounds that (1) no notice of Judge Burrowes' deposition of the will scrivener was given; (2) the deposition did not conform to the requirements of 43 CFR 4.221(f) and did not have its exhibits attached, in particular, decedent's earlier will; (3) the probate of decedent's estate was untimely; (4) the will did not express decedent's intent because it contains six changes from an earlier will, whereas the scrivener stated that she thought only one change was made; (5) because of her blindness, hearing problem, and limited use of English, decedent did not understand the will as it was read to her and was thus subject to fraud; (6) instructions printed on the will form and the form "Affidavit to Accompany Indian Will" require that reasons be given for omission of appellant Rice from decedent's will; (7) the will and affidavit are incomplete; (8) one of the attesting witnesses was related to decedent by marriage; and (9) Judge Taylor erred in his approval of two of the claims filed against decedent's estate.

Appellants' arguments are somewhat diffuse. Many of them, however, *i.e.*, (1), (2), (4), and (5), relate to the circumstances under which decedent's will was executed and the circumstances under which the will scrivener's testimony concerning that event was taken.

[1] Appellants first argue that they were deprived of due process of law because they were not given notice of the taking of the scrivener's testimony. They did not make this argument in their petitions for rehearing. The Board has held on many occasions that it is not required to consider arguments or evidence raised for the first time on appeal, although it may do so in extraordinary circumstances, through exercise of the inherent authority of the Secretary to correct a manifest error or injustice. *E.g.*, Estate of Leon Levi Harney, 16 IBIA 18, 20 (1987); Estate of Ella Dautobi, 15 IBIA 111, 120 (1987), and cases cited therein.

There is no evidence in the record that notice of the taking of the scrivener's testimony was given. In this situation, appellants' due process allegation constitutes an allegation of extraordinary circumstances warranting Board review of the issue despite appellants' failure to raise it in their petitions for rehearing.

[2] The Board agrees that appellants should have been given notice of the taking of the scrivener's testimony and the opportunity to cross-examine her. 43 CFR 4.221(e), concerning depositions in Indian probate proceedings, provides in relevant part: "The deponent shall be examined under oath or affirmation and shall be subject to cross-examination." In the Estate of Rena Marie Edge, 7 IBIA 53, 58 (1978), the Board held that the failure to allow cross-examination of a witness violated the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982). ^{1/} In this case, because of the controversy concerning decedent's execution of her will, the scrivener's testimony is crucial. The opportunity for appellants to cross-examine her is essential to a full and complete hearing. Accordingly, the Board finds that this case must be remanded for the purpose of allowing appellants the opportunity to question the scrivener. Appellants may pursue their arguments (2), (4), and (5) at that time.

[3] Appellants' third argument is that approval of decedent's will should be revoked and the matter remanded for another hearing because the probate of decedent's estate was not timely. Appellants cite 43 CFR 4.210(b), which requires the Superintendent having jurisdiction to commence probate within 90 days of receipt of notice of the death of an Indian owning trust property. It is not possible to tell whether the regulation was violated in this case because the record does not show when the Superintendent received notice of decedent's death, but even assuming a violation occurred, it would not be grounds for revoking approval of decedent's will. Appellants' third argument is rejected.

[4] Appellants' sixth argument is that the will is invalid because the "Instructions to Field Officers" printed on the will form and an instruction printed on the accompanying affidavit form were not followed. Appellants state that decedent's will gave no reason for appellant Rice's omission, although the instructions required that reasons be given. Their seventh argument, that the will and affidavit are incomplete, is related to their sixth argument.

Instruction No. 2 on the will form states: "Inquire carefully into the immediate family of testator. If a husband, wife, child or grandchild who is an heir is given nothing, the reason must be set out." The instruction on the affidavit form states:

^{1/} 5 U.S.C. § 556(d) provides in relevant part: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

(*) At this point should be inserted the tribe and allotment or other identifying numbers of the devisees and beneficiaries and their relationship to the testator or testatrix (unless this information is shown in the body of the will), and the testator's or testatrix's reasons for making the devises, particularly when the immediate relatives are given little or none of the estate.

The instructions printed on the will and affidavit forms are advisory only. Estate of Alexander Charette, 15 IBIA 92 (1987). Despite the printed instructions, the Board held in Charette, a will is not invalid because it fails to give reasons for the omission of heirs. Decedent's will contains no omissions which would invalidate it.

There are omissions in the affidavit accompanying decedent's will, as Judge Taylor noted. However, as he also noted, the affidavit became immaterial when decedent's will was contested. The purpose of an affidavit accompanying an Indian will is to make the will self-proved, i.e., to render the testimony of the attesting witnesses unnecessary at the probate hearing. 43 CFR 4.233(a). However, when a will is contested, the testimony of the witnesses is required. 43 CFR 4.233(c). 2/ Decedent's will was contested, and the testimony of the attesting witnesses was taken. The affidavit is therefore inconsequential, and the fact that it contains omissions has no effect on the validity of the will. Appellants' sixth and seventh arguments are rejected.

[5] Appellants' eighth argument is that the will was irregular in that one of the attesting witnesses, Evelyn White Crane, was related to decedent by marriage. Ms. White Crane testified that she was a cousin of decedent's second husband. She is not a beneficiary under decedent's will. The fact that she was related to decedent by marriage does not affect the validity of the will. Therefore, appellants' eighth argument is rejected.

In their ninth argument, appellants object to three claims approved by Judge Taylor, a claim for \$670.44 filed by the Credit Bureau of Billings Inc. (credit bureau), Billings, Montana, and two claims filed by the Oklahoma Bank and Trust Company (bank), Clinton, Oklahoma. 3/ Appellants

2/ 43 CFR 4.233 provides in relevant part:

"(a) Self-proved wills. A will * * * may, at the time of its execution, be made self-proved, and testimony of the witnesses in the probate thereof may be made unnecessary by the affidavits of the testator and attesting witnesses, made before an officer authorized to administer oaths, such affidavits to be attached to such will * * * If uncontested, a self-proved will may be approved and distribution ordered thereunder with or without the testimony of any attesting witness.

* * * * *

"(c) Will contest. If the approval of a will * * * is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined."

3/ Judge Taylor treated a claim filed by the bank as two separate claims, one in the amount of \$150.23 plus interest at 21 percent per annum from

did not raise objections to any of these claims in their petitions for rehearing. ^{4/} As discussed above, because these objections are raised for the first time on appeal, the Board is not required to consider them. It will not do so unless extraordinary circumstances warrant Board review.

With respect to the claim of the credit bureau, appellant Whiteman indicated at the probate hearing that he wanted more information, apparently so he could determine whether he should object to the claim. Judge Taylor responded that the claim would be held in abeyance and that he would seek further information from the claimant (Hearing transcript at 5-6). The record does not reflect any further inquiry regarding this claim.

Under these circumstances, the Board finds that extraordinary circumstances exist and that the Board may therefore consider the issue of the credit bureau's claim despite appellants' failure to raise it in their petitions for rehearing. The Board further finds that, because of Judge Taylor's commitment to seek further information concerning this claim, the matter of the credit bureau's claim must be remanded for further proceedings.

With respect to the claims of the bank, appellant Whiteman stated at the hearing that he had no objection. ^{5/} As noted above, neither appellant raised the matter in his petition for rehearing. Further, neither appellant has standing to challenge Judge Taylor's approval of the \$1500 claim because the Judge approved it for payment only from James Little Coyote's share in decedent's estate. Appellants' interest in decedent's estate, whatever that may be, is not affected by approval of the \$1500 claim. Appellants have not shown extraordinary circumstances warranting Board review of their objection to either of the bank's claims. Their objection to the bank's claims is therefore rejected.

On remand, proceedings in this case shall be limited to (1) provision of an opportunity for appellants to question the scrivener, and (2) further investigation of the credit bureau's claim. In connection with their questioning of the scrivener, appellants shall be given the opportunity to pursue the issues raised in their arguments (2), (4), and (5), described above.

fn. 3 (continued)

Apr. 29, 1985, and the other in the amount of \$1,500 plus interest at 18 percent per annum from Apr. 29, 1985. He approved both claims but provided that the \$1500 claim could be paid only from James Little Coyote's share of the estate. The Board follows Judge Taylor in considering these claim separately.

^{4/} Appellants do not pursue the objection to the hospital's claim raised by appellant Whiteman in his petition for rehearing.

^{5/} James Little Coyote objected to the bank's claims at the hearing but did not pursue the matter.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this case is remanded to Judge Taylor for further proceedings in accordance with this opinion.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge